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Supreme Court of the United States

OCTOBER TERM, 1950.

No. [redacted] 66

THE NORTH ARLINGTON NATIONAL BANK,
Petitioner,

vs.

KEARNY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Counter-statement of the Case.

This action was brought by the petitioner bank in the New Jersey Superior Court (subsequently removed to the U. S. District Court), against the respondent as the sole defendant, for a declaratory judgment that the opening and establishment of a branch office by respondent was unlawful, both under the laws of the United States and of New Jersey, and for an injunction to restrain the respondent from operating a branch office in North Arlington. Respondent's home office is in Kearny. North Arlington and Kearny adjoin. The branch office of which the petitioner complains is about a half mile from the main office of the respondent.

Both Kearny and North Arlington are small communities within the New York-North Jersey metropolitan district. Each is about 10 miles from New York City. The population of North Arlington is 15,977; that of Kearny 39,828. 1950 Census of Population, Preliminary Count, Oct. 5, 1950.

How closely-knit and integrated are the community interests of Kearny and North Arlington may be deduced from the fact that the larger part of Kearny is commonly referred to as Arlington. Indeed, there is no Kearny, New Jersey, post office. The post office for that community is designated as Arlington, New Jersey, reflecting the popular rather than the legal name of the town. U. S. Official Postal Guide for 1949, page 295. The fact that the smaller community is named North Arlington bespeaks its closeness, geographically, economically and sociologically to the larger community, Kearny, commonly known as Arlington. Both communities are included in the Passaic Valley Sewerage District. Revised Statutes of New Jersey 58:14.

Both the petitioner and the respondent are chartered and supervised by the United States Government. 12 U. S. C. A. 21, *et seq.;* 12 U. S. C. A. 1464. The respondent association is one of some 1498 such federally chartered mutual, or cooperative, thrift and home financing institutions which receive the savings of their members and invest those savings principally in loans on the security of mortgages on homes owned by members and located within fifty miles of the association's home office (R. 25).

Before branch office operation was authorized, the Home Loan Bank Board held a public hearing on the savings and loan association's application to establish a branch office—not a branch—and presumably found that the public would be benefited by the establishment of such office.

In its complaint seeking to enjoin the operation of the branch office by the respondent, the bank admits that the office was opened with the prior approval of the United States. The bank made no appearance at the public hearing before the Home Loan Bank Board on the application of the respondent for that approval (R. 24). Later, the petitioner petitioned the Government to rescind approval. Its petition was denied, which entitled the petitioner to an administrative hearing on whether the approval should be rescinded (Rules and Regulations for the Federal Savings and Loan System, 24 C. F. R. 202.29-1947 ed.), but the petitioner has never requested the hearing (R. 24, 25). Instead, it waited until after the branch office was in operation, when it filed this action.

The Kearny Federal Savings and Loan Association was originally established as Kearny Building and Loan Association in 1884. Since that time, the present association and its predecessor have always had mortgage loans, shareholders, and depositors in North Arlington, and in December, 1948, prior to petitioner's suit, respondent had on its

books 155 mortgage loans on property in North Arlington, totaling $676,084.54 and 939 savings accounts with residents of North Arlington, totaling $474,630.42 (R. 36).

The practice with regard to branch offices under state statutes affecting state-chartered savings and loan associations is not uniform. Only six states have statutes which prohibit the establishment of branch offices by savings and loan associations. Thirteen states specifically authorize them, and the legislation of twenty-nine states is silent upon the subject (R. 1, 2). Report of Committee on Banking and Currency Sen. Rep. No. 1118, 81st Cong., 1st Sess. 2 (1949).

REASONS FOR DENYING THE WRIT.

POINT I.

The petitioner has no standing to challenge the competition of the respondent.

A. A competitor may not maintain an action to enjoin competition otherwise lawful because of an infirmity in the statutory grant of power to respondent.

The law is clear that a plaintiff has no standing in court to enjoin competition, otherwise lawful, because the defendant is acting *ultra vires,* or because of an infirmity in the statutory grant of power to defendant. *Tennessee Electric Power Company* v. *Tennessee Valley Authority* (1939), 306 U. S. 118; *Alabama Power Company* v. *Ickes* (1938), 302 U. S. 464; *New Orleans, M. & T. R. Co.* v. *Ellerman,* 105 U. S. 166; *Sheridan-Wyoming Coal Co.* v. *Krug* (C. C. A. D. C. 1948), 168 F. 2d 559.

There is and can be no question in this case that the respondent is lawfully conducting its business of receiving share payments from its members, lending money on first mortgages, and the like. Indeed, this is admitted by the

petitioner. Petitioner's sole complaint is that respondent is conducting its lawfully authorized business not only from its home office, but also from a branch office. But, "the mere coincidence of some illegality which enables [respondent] to compete is immaterial." *Sheridan-Wyoming Coal Co.* v. *Krug, supra.*

Much reliance was placed by the petitioner in its argument below on the case of *Frost* v. *Corporation Commission* (1929), 278 U. S. 515, as giving it the right to maintain its action, even in the face of *Tennessee Electric Power Company* v. *Tennessee Valley Authority, supra; Alabama Power Company* v. *Ickes, supra;* and *New Orleans, M. & T. R. Co.* v. *Ellerman, supra.*

We submit, however, that the facts in the instant case are distinguishable from those in the *Frost* case and squarely within those of the cases we have cited. The essential facts of the *Frost* case are stated, and the distinction drawn, in *Alabama Power Co.* v. *Ickes, supra,* wherein the court said:

> "Frost *v.* Corporation Commission, 278 U. S. 515, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin could be operated without a license from the commission, which could be obtained only under specific conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive against an attempt to operate a competing gin without a permit or under a void permit. The Durant Co-operative Gin Com-

> pany sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. We concluded that a legal right of Frost to be free of such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction against the commission and the Durant Company. See Corporation Commission *v.* Lowe, 281 U. S. 431, 435. The difference between the Frost case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful."

In *Alabama Power Co.* v. *Ickes, supra,* the validity of loan and grant agreements was challenged, the alleged damage to plaintiff being the consequent competition which would otherwise be lawful. Here, the permission to operate a branch office is challenged as unlawful, the alleged damage to the petitioner being the consequent competition. Here, also, as in the *Ickes* case, the legality of the competition is not and cannot be denied. The petitioner admits—as it must—that respondent may lawfully grant loans on property within a radius of fifty miles from its home office and that, insofar as such activity constitutes competition with petitioner, such competition is lawful. What is attacked is the legality of a mere intermediate step rendering somewhat more convenient for certain borrowers and investors access to respondent's undeniably lawful competition. It seems to us that the parallel between the *Ickes* case and the case *sub judice* is unavoidably clear.

In the *Frost* case the very right to engage in the business itself was in question. Here, on the other hand, the respondent savings and loan association is and will be engaged in lawful competition with petitioner, whether or not it continues to operate its branch office.

Another fundamental distinction between the *Ickes* and *T. V. A.* cases on the one hand, and the *Frost* case, on the other, lies in the question of whether the authorization of competitive activity constitutes an unlawful impairment of the obligation of contract. In the *Frost* case, the court held that plaintiff's franchise gave it a contractual right not to have any competition except from a licensee who had obtained a franchise which could be obtained only upon compliance with specific conditions, similar to those requirements which plaintiff itself had met.

Here, on the other hand, the petitioner certainly cannot assert that mortgage lending could be engaged in in its area only by another national bank which had met the minimum conditions to secure a national bank franchise. Any individual could have engaged in lending money on bond and mortgage without such license. The State of New Jersey could have authorized the establishment of a state savings and loan association in the same area as that served by the petitioner. And suppose the respondent association, instead of applying for leave to establish a branch office, had been granted leave to move its home office from its present location to that of the branch office. Could petitioner have contended with any hope of success that any one of the foregoing hypothetical situations constituted an unlawful invasion of its alleged property rights?

Illustrative of the fundamental concept of impairment of the obligation of contract expressed by the courts in cases similar in principle to the *Frost* case are, *Butchers Union Slaughter House* v. *Crescent City Live Stock Landing Co.* (1883), 111 U. S. 746; *New Orleans Gas-Light Co.* v. *Louisiana Light etc. Mfg. Co.* (1885), 115 U. S. 650; *St. Cloud Public Service Co.* v. *St. Cloud* (1924), 265 U. S. 352.

These cases, like the *Frost* case and *City of Campbell* v. *Arkansas-Missouri Power Co.* (C. C. A. 8th Dist. 1932),

55 F. (2d) 560, exemplify situations where a state legislature contracted that no person other than the corporation or some person similarly circumstanced might engage in a particular type of business. Here, the petitioner cannot and has not pointed to any contractual obligation of the federal government not to permit any other person or persons who had not secured national bank franchises to engage in mortgage lending or thrift activity. The distinction is that no one but a properly licensed cotton gin association could engage in cotton ginning in Oklahoma; none but a properly licensed public utility could sell power in Missouri. In New Jersey, a savings and loan association may accept deposits and lend money on bond and mortgage. The distinction is between lawful competition and an illegal invasion of a franchise.

In *Corporation Commission* v. *Lowe,* 281 U. S. 431, the principle of the *Frost* case was thus stated:

> "In Frost *v.* Corporation Commission of Oklahoma, 278 U. S. 515, the Court concluded that one who had complied with the statutes of Oklahoma and had obtained a permit to operate a cotton gin, held a franchise which constituted a property right, and that while this right did not preclude the state from making similar valid grants to others, it was an exclusive right as against attempts to operate a competing gin without a permit or under a void permit (p. 435)."

Again the *Frost* case was interpreted in *Carolina Power & Light Co.* v. *South Carolina Public Service Authority* (C. C. A. 4th, 1938) 94 F. (2d) 520, cert. den. 58 Sup. Ct. 1048, at page 524:

> "Plaintiffs rely upon the case of Frost *v.* Corporation Commission, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483; but the extent of the holding there was

> that the holder of a nonexclusive franchise was entitled to *enjoin the competition of one who was subject to but did not comply with the franchise requirements of the same statute.* The rationale of the decision is that a state statute regulating a business affected with a public interest and requiring a determination of public convenience and necessity creates a quasi monopoly for those engaged therein and gives them a right to enjoin competition by those who have not complied with its provisions." (Italics ours.)

Here, on the contrary, the savings and loan association is not subject to the same statute which controls national banks. No one contends that the respondent must be chartered or its branch office authorized under the National Banking Act. Its authority comes from the Home Owners' Loan Act of 1933. Federal legislation authorizing national banking associations does not contemplate the granting of exclusive rights to particular territories even as between national banks, while the states have continued to charter corporations that perform some or all of the functions of banks. Congress itself has specifically authorized and directed the creation of other federal financial institutions, including federal savings and loan associations, obviously contemplating a certain competition among federal instrumentalities, as well as that between federal and state instrumentalities. Thus, state banks and state building and loan associations, and other state and federally chartered financial institutions having their authority from other sources than the National Banking Act and not chartered under the National Banking Act have a right to and do perform functions in the Borough of North Arlington whether or not they have established offices therein. Nor does the petitioner present for the Court's consideration

any certificate of convenience and necessity which it holds from any public authority, state or federal.

The factual similarity between *New Orleans M. & T. R. Co.* v. *Ellerman,* 105 U. S. 166, and the instant case is striking. There the proposed lessee had the right to engage in business as a wharfinger just as here, the respondent has a right to engage in business as a savings and loan association. There an attempt was made to prevent his opening a place of business at a particular location, on the ground that the proposed lease was *ultra vires* the lessor, just as here, an attempt is made to prevent the respondent from maintaining a branch office in North Arlington, on the ground that the Home Loan Bank Board was without power to grant such authority. The Supreme Court said in the *Ellerman* case:

> "But if the competition in itself, however injurious is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*?"

Suppose an individual, engaged in lending money on first mortgages, opened an office directly opposite the petitioner bank. Obviously, this would be lawful competition of which petitioner could not complain, however injurious it might be. Similar in principle, we submit, are the facts in the instant case.

B. Only the government, federal or state, has standing in court to challenge the exercise of a franchise or license by a corporation, unless such a right is conferred by statute on private persons.

Tennessee Electric Power Co. v. *T. V. A., supra; Alabama Power Co.* v. *Ickes, supra; New Orleans M. & T. R. Co.* v. *Ellerman, supra; Union National Bank* v. *Matthews*

(1878), 98 U. S. 621; *Parson* v. *Barry* (1944), 59 F. Supp. 221, affd. 148 F. (2d) 21, 80 U. S. App. D. C. 409, cert. denied, 326 U. S. 726, rehearing denied 326 U. S. 808.

From these cases, and particularly the *Ellerman* case, the rule appears to be that only the sovereignty which created the corporation may challenge its *de jure* existence or the exercise of its franchise. Only the properly constituted authorities of the United States Government may challenge the validity of the establishment of a branch office.

A private person has no legal right to prevent competition. *Rio Grande Valley Gas Co.* v. *City of McAllen* (1945), 152 F. (2d) 591; *Sheridan-Wyoming Coal Co.* v. *Krug* (D. C. 1948), 168 F. (2d) 557.

POINT II.

The United States has lawfully granted the respondent association authority to operate a branch office.

A. The statute conferring power upon the Home Loan Bank Board to prescribe rules for the establishment and operation of federal savings and loan associations gives the Board implied power to license branch offices and such implied authority is constitutional.

Section 5(a) of the Home Owners' Loan Act of 1933, 12 U. S. C. 1464(a), reads as follows:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue char-

ters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

This statutory grant of authority to establish federal savings and loan associations is constitutional *First Federal Savings & Loan Association* v. *Loomis* (1938), 97 F. (2d) 831, 121 A. L. R. 89, cert. granted 305 U. S. 562, Cert. dismissed 305 U. S. 666.

Likewise, the delegation of power to the Home Loan Bank Board to adopt rules and regulations is valid. *Fahey* v. *Mallonee* (1947), 332 U. S. 245.

B. The administrative history of the Act shows that rules providing for branch offices have been in effect since 1934, and that authority has never been challenged.

In the above quoted section 5(a) of the Home Owners' Loan Act of 1933, the Board has been expressly authorized to provide for the operation of federal savings and loan associations.

The statute further expressly uses the term "home office" in reference to federal savings and loan associations (Sec. 5c), thereby necessarily implying that such an association may have offices other than its home office.

As its name implies, the Home Owners' Loan Act of 1933 was adopted in that year. Since October, 1934 there has always been included in the rules and regulations for federal savings and loan associations a provision for the granting of permission to operate branch offices. That provision has appeared in every revision of the rules and regulations for federal savings and loan associations in substantially identical form (R. 25, 47). During that period, the Home Owners' Loan Act of 1933 has been successively administered by the Federal Home Loan Bank Board in

accordance with the Home Owners' Loan Act of 1933 and then by the Federal Home Loan Bank Administration created by Executive Order 9070 (50 U. S. C. A. App. 601) and by the present Home Loan Bank Board created by Reorganization Plan No. 3 of 1947 (5 U. S. C. A. 133y-16).

The by-laws prescribed by the regulations also refer to "home office". Charter K, regulation 202.9(a) also states: "No office of the association shall be moved", etc.; by-laws, Reg. 202.9(b), Par. 2, Par. 4, Reg. 202.29(b) and (d); Reg. 203.16 (a), (b) and (f). The foregoing citations refer to the 1947 revision of the Rules and Regulations. See also the following sections of the 1949 revision: 144.5, Pars. 1, 2, 4; 144.1, Par. 2; 144.3. Also note that section 144.7 in the 1949 revision provides that a true copy of the association's Charter and by-laws must be available "in each of the offices" of the association.

C. The legislative history of the Act demonstrates that, although the regulations have been in effect since 1934, and the Act has been repeatedly amended, the power to provide for the establishment of branch offices has never been challenged.

During the period, practically coincident with the existence of federal savings and loan associations, that authority has been expressed in published regulations for the operation of branch offices by these associations, and in which period these associations have actually operated branch offices, Section 5 of the Home Owners' Loan Act of 1933 has been repeatedly amended. 49 Stat. 279; 61 Stat. 786; 53 Stat. 1402; 48 Stat. 645, 646; 62 Stat. 1239. Committee hearings, committee reports, and debates on the floor of Congress are entirely free of any inference that this established regulation and the grants of authority by the Home Loan Bank Board to federal savings and loan associa-

tions to operate branch offices have been other than in full accord with the intent of Congress as expressed in the basic statute.

Not only do the regulations, as we have shown above, specifically provide for branch offices and refer to home offices, but Charter K, incorporated in Regulation 202.9, provides (Art. 3 of Charter K):

> "In addition to the foregoing powers expressly enumerated, the association shall have power to do all things reasonably incident to the accomplishment of its express objects and the performance of its express powers * * * and shall exercise its powers in conformity with * * * the Home Owners' Loan Act of 1933 * * * and with the rules and regulations made thereunder which are not in conflict with this charter."

It has been frequently held that:

> "The failure of Congress to amend a statute, after administrative rulings have been made construing or applying it, has been recognized as evidence of Congressional approval of such rulings." *U. S.* v. *Ickes,* 98 F. 2d 271, cert. den. 305 U. S. 619; *Constanzo* v. *Tillinghast,* 287 U. S. 341.

However, here we have even more cogent evidence of the the Congressional approval of the power of the Board to authorize branch offices than its mere silence on the subject. H. R. 4710 and S. 2006, both introduced in the 81st Congress, provided for limitations upon the power of the Board with respect to the establishment of branch offices. Again, bills were introduced in the 81st Congress, H. R. 4736, H. R. 5900, prohibiting the issuance of the revised regulations which contained provisions empowering the Board to authorize the establishment of branch offices. The report

on S. 2006 of the Committee on Banking and Currency stated:

> "The bill * * * would amend sub-section D of Section 5 of the Home Owners Loan Act of 1933 in such a way as to present the same restrictions upon the establishment and operation of branches by Federal savings and loan association as are now prescribed by statute for the establishment and operation of branches by national banking associations."

The failure of these bills in Congress is stronger argument for the Congressional recognition of existence of the power than mere silence by Congress.

D. Operation requires offices.

1. Statute refers to "home office", clearly implying Congressional intent that offices other than home offices might be established.

The grant of authority to provide regulations for the operation of federal savings and loan association is by any normal construction a grant of authority to provide for the operation of these institutions through whatever office or offices are, in the judgment of the administrative agency, necessary or appropriate. Provision for offices is one phase of providing for operation. In addition, reference is specifically made in the statute to "home office", with the consequent inference that other offices might be authorized. 12 U. S. C. A. 1464(c).

2. Where statute merely prescribes broad standards for administrative agency, grant of power to administrative agency is to be liberally construed.

Where, as here, the statute does not prescribe in detail the manner of regulation, organization and operation, but merely prescribes broad standards for the administrative

agency to follow in its formulation of rules and regulations, then the grant of such power is to be liberally construed.

This rule and the reasons therefor are well stated in *Sunshine Anthracite Coal Co.* v. *Adkins* (1940), 310 U. S. 381 and *American P. & L. Co.* v. *Sec. & Exchange Commission* (1946), 329 U. S. 90, wherein the court says (at page 105):

> "The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. See Sunshine Anthracite Coal Co. *v.* Adkins, 310 U. S. 381. The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity, therefore, fixes a point beyond which it is unreasonable and impracticable to compel Congress to provide detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. • • • And where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence."

The case *sub judice* meets the above tests. The required end is stated in the statute: to provide local, mutual, thrift institutions in which people may invest their funds and to provide for the financing of homes. For the attainment of that end, there is a broad grant of authority to the Board to provide for the organization, incorporation, operation,

regulation and supervision of federal savings and loan associations. The standards are defined; the limitations are set. Under and within those standards and limitations the means for attaining the end are within the discretion of the Board.

Insomuch, therefore, as the Congressional aim is stated and the Board is required to attain it, the methods, so long as they do not violate statutory restrictions, are for administrative determination.

In *Fahey* v. *Mallonee, supra,* the United States Supreme Court, in dealing with other provisions of the very statute *sub judice,* held that the power delegated to the Federal Home Loan Bank Board to regulate savings and loan associations was constitutional. The court said:

> "The provisions are regulatory. They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking practice * * * A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields."

Counsel for petitioner cites and relies upon *First National Bank* v. *Missouri* (1924), 263 U. S. 640, in support of his contention that establishment of branches was not authorized. That case is clearly distinguishable from the instant case. It applies to banks, not to savings and loan associations, and it construes a statute materially different from that under consideration here. In *First National Bank* v. *Missouri, supra,* the Supreme Court explains as follows the rationale which caused it to hold that a national bank has no power to establish branches:

> "The extent of the powers of national banks is to be measured by the terms of the Federal statutes re-

lating to such associations, and they can rightfully exercise only such as are expressly granted, or such incidental powers as are necessary to carry on the business for which they are established. [Citing cases.] Among other things, the Federal law (Rev. Stat. § 5154, Comp. Stat. § 9694, 6 Fed. Stat. Anno. 2d ed. p. 713) provides that the organization certificate of the association shall specifically state '*the place* where its operations of discount and deposit are to be carried on, designating the state, territory, or district and the particular county, city, town, or village.' By another provision (Rev. Stat. § 5190, Comp. Stat. § 9744, 6 Fed. Stat. Anno. 2d ed. p. 740) it is required that 'the usual business of each national banking association shall be transacted at *an office or banking house* located in the place specified in its organization certificate.' *Strictly, the latter provision, employing, as it does, the article 'an' to qualify words in the singular number, would confine the association to one office, or banking house.* * * * By § 5138, Rev. Stat. (Comp. Stat. § 9675, 6 Fed. Stat. Anno. 2d ed. p. 687), the minimum amount of capital is fixed in proportion to the *population of the place where the bank is located.* If it had been intended to allow the establishment by an association of not one bank only, but, in addition, as many branch banks as it saw fit, it is remarkable, to say the least, that there should have been no provision for adjusting the capital to the latter contingency, or for determining how or under what circumstances such branch banks might be established, or for regulation of them. Section 5155, Rev. Stat. (Comp. Stat. § 9695, 6 Fed. Stat. Anno. 2d ed. p. 715), provides that it shall be lawful for a state bank 'having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association * * * and to retain and keep in operation its branches * * * the amount of circulation * * * to be regulated by the amount of

> capital assigned to and used by each.' This provision, confined by its terms, as it is, to existing state institutions, may be fairly considered as constituting an exception to the general rule, and the presence of safeguarding limitations in the excepted case, with their absence from the statute otherwise, goes far in the direction of confirming the conclusion that the general rule does not contemplate the establishment of branch banks. This apparently was the interpretation of Congress itself; since in two instances, at least, special legislation was deemed necessary to allow the establishment of branch banks; viz., at the Chicago Exposition, May 12, 1892, chap. 71, 27 Stat. at L. 1444, § 21; the existence of the branch bank in each instance being expressly limited to the period of two years.
>
> "The construction of the executive officers charged with the administration of the law has been, with substantial uniformity, to the same effect * * *" (Italics ours.)

It is thus readily apparent that the main reason which caused the United States Supreme Court to hold that a national bank could not establish branches was the express wording of the statute which spoke of "an office or bank house," and which referred to "the population of the place where the bank is located." In this case, on the contrary, the statute speaks of the "home office" of the savings and loan association, thus necessarily implying that the association may have offices other than a home office.

Another difficulty with petitioner's attempt to apply the reasoning of *First National Bank* v. *Missouri* to the instant case is that the organic statute providing for the establishment and regulation of national banks is not the same as or similar to that providing for the organization of federal savings and loan associations. It should be borne in mind that the National Banking Act construed by the Supreme

Court in the *First National Bank* v. *Missouri* case was adopted in 1863. The Home Owners' Loan Act of 1933 was adopted 70 years later. In the interim, there had been a tremendous development in the field of administrative law, and there became increasingly manifest a tendency on the part of Congress to outline general objectives in its enactments, entrusting to a board of experts the working out of details to effect the broad Congressional policy. This trend is reflected in a comparison of the two statutes, and even a cursory examination will reveal that the provisions of the National Banking Act are in most important respects dissimilar to those of Home Owners' Loan Act.

The 1863 Banking Act construed in the *First National Bank* v. *Missouri* case was a statute which embodied in detail the law of incorporation of national banks. On the other hand, the Home Owners Loan Act of 1933 is not the law of incorporation of federal savings and loan associations. *Keifer and Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381. The "law of incorporation" of these associations is embodied in the Rules and Regulations of the Home Loan Bank Board. In the National Banking Act, the powers of national banks are set forth in detail. The comptroller of the currency, although he has supervisory powers, is not granted rule-making powers. His function is more that of a policeman than a person vested with discretion to make rules for the organization, regulation, and management of national banks. The two statutes are totally dissimilar, in letter and in spirit, and arguments by analogy based upon the National Banking Act of 1863 are not applicable to the completely different Home Owners Loan Act of 1933.

A major fallacy in petitioners argument is that it takes for granted that cases construing the National Banking Act are *ipso facto* applicable to all federal financial insti-

tutions. This ignores the fact that the organic statute providing for the organization of savings and loan associations is totally different, both in letter and spirit, from the National Banking Act, as we have indicated above.

3. Administrative definition in regulations and practice established over long period of time are entitled to weight in judicial interpretation of statute.

Pursuant to the regulations of the Federal Home Loan Bank Board, 59 associations are operating 73 branch offices in 22 States and the District of Columbia. Affidavit of J. Francis Moore (R. 5, 25). The administrative definition contained in the regulations since 1934, and the established practice, are not to be disregarded in a judicial interpretation of the statute. *United States* v. *Wyoming* (1947), 331 U. S. 440; *Commissioner of Internal Revenue* v. *South Texas Lumber Co.*, 92 L. Ed. 831; *U. S.* v. *Midwest Oil Co.* (1915), 236 U. S. 459; *U. S.* v. *Minnesota* (1926), 270 U. S. 181; Cf. *Federal Trade Commission* v. *Bunte Bros.* (1941), 312 U. S. 349, 352.

E. Federal savings and loan associations are not banks, nor governed by the banking statutes.

Petitioner argues by analogy that the fact that Congress amended the Banking Act to provide for branch banks only where the states permitted state banks to have branches implies a like intention with regard to federal savings and loan associations. Such arguments by analogy are always dangerous and should be scrutinized with great care. If Congress had intended to enact a law forbidding the establishment of branches, it could have done so by following the language of the National Banking Act. It was presumed to know the decision of this Court in *First National Bank* v. *Missouri, supra,* and to enact subsequent

legislation in the light of that knowledge. Had it intended to hedge about federal savings and loan associations with the same restrictions as those imposed upon national banks, it would have needed only to follow the language of the Banking Act. Its failure to do so clearly indicates a contrary Congressional intent. And its knowledge of past administrative interpretation amounts to an acquiescence to the administrative use of those powers. *U. S.* v. *Midwest Oil Co.* (1915), 236 U. S. 459.

Petitioner also urges that because branches of national banks are hedged about with certain restrictions, the absence of such statutory restrictions regarding branches of savings and loan associations implies a Congressional prohibition of such branches. This ignores the broad and general language of the Home Owners' Loan Act, which enjoins upon the Home Loan Bank Board to "provide for the organization, incorporation, examination, operation, and regulation of associations * * * giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

Thus, instead of assimilating the question of branches to local or national bank law, the Board is commanded to ascertain what are the best practices of local mutual thrift associations. In 13 states, branches of building and loan associations are expressly permitted, they are forbidden in six, while 29 have no express statutory prohibition.

The Board had a right, after studying existing state practices, to decide that the best local mutual thrift practice was that which authorized branch offices.

The legal tender cases (12 Wall. 457) sanction the assertion that the period and circumstances should be considered in passing upon fiscal method and policy, and new devices adopted to serve expanding needs. The program for development of these associations cannot be a vital, expanding

enterprise if the Board is to be restricted to a rigid pattern developed in the past. It was in full realization of this consideration that Congress wrote merely its broad general objectives and standards into the Act, leaving to the Board the power to implement them in the light of the current "best practices" and with the right to modify its regulations from time to time to conform with changes in economic and fiscal conditions.

An older case which clearly demonstrates the liberal construction given where Congress broadly defines the objectives to be attained and sets the general standards, leaving implementation to an administrator is *U. S.* v. *Grimaud* (1911), 220 U. S. 506. In that case, it appears that the Secretary of Agriculture, acting under statutes referred to below, promulgated a rule that all persons must secure permits before grazing stock in a forest reserve, except the few head in actual use by prospectors, etc., "not exceeding a total of six head". Defendants were indicted for violation of that regulation and challenged the authority of the Secretary to promulgate it. The court held:

> "From the various acts relating to the establishment and management of forest reservations it appears that they were intended 'to improve and protect the forest and to secure favorable conditions of water flows.' * * * It was also declared that the Secretary 'may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; *and any violation of the provisions of this act or such rules and regulations shall be punished'* as is provided in § 5388, c. 3, p. 1044 of the Revised Statutes, as amended.

> "* * * The Secretary of Agriculture could not make rules and regulations for any and every purpose. Williamson *v.* United States, 207 U. S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forests from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty. * * *"

It will be noted that in the acts construed in the *Grimaud* case, there was a far broader delegation of powers and expressions of purpose than those set forth in the Home Owners' Loan Act for the guidance of the Board. Furthermore, there was involved in that case the imposition of a criminal penalty and the "creation of new crimes", which, under *Fahey* v. *Mallonee* (1947), 332 U. S. 245, require a somewhat stricter construction of the scope of delegated authority than obtain in situations lacking that element. Nowhere in the acts construed in the *Grimaud* case is a numerical guide given the Secretary as to how many head of cattle may graze without a permit. Yet his regulation, creating a new crime, was sustained. Certainly that case goes much further than we are asking the Court to go here in sustaining as lawful a regulation promulgated by an administrative body.

Petitioner cites *Fahey* v. *Mallonee* (1947), 332 U. S. 245, and *Maher* v. *Reis,* 46 N. Y. Supp. 2d 546, 182 Misc. 837 in support of its argument that statutes applicable to banks should be applied to savings and loan associations. We do

not so read those cases nor do we concede that savings and loan associations are banks, although it is true that in some respects there is a marked similarity and that savings and loan associations do perform some of the functions frequently performed by banks.

In the early case of *State* v. *Newberry* (N. J. Sup., 1904), 71 N. J. L. 18, 58 A. 163, the court expresses doubt that the reception and payment of deposits constitutes banking. The case is also significant in that it recognizes that even if such conduct does constitute banking, the legislature may authorize building and loan associations to engage in such activity under different statutes, rules and regulations than those governing banks. Similarly, here, we submit that even if some of the activities of the defendant resemble some phases of banking, Congress could and did authorize such activity under different rules, regulations, and safeguards than those governing commercial banks.

In *Fahey* v. *Mallonee, supra,* the Supreme Court did not hold that savings and loan associations were banks. In that case the court notes that the regulations promulgated by the Board are *similar* to those long established in the banking field, and that they "are the usual and conventional grounds found in most state and federal banking statutes. They are sufficiently explicit, against the *background of custom,* to be adequate for proper administration and for judicial review if there should be a proper occasion for it." (Italics ours.)

In other words, the court in the *Fahey* case, said that federal savings and loan associations were relatively new; that regulations prescribed for them, if untried and untested in other fields, might have been stricken down because they constituted an exercise of legislative power. But standards similar to those long established and well tested in

a cognate field were held not vulnerable to such attack. As we read the *Fahey* case, this is as far as it goes in likening savings and loan associations to banks. And such a rule is a far cry from holding that savings and loan associations are banks, and that all statutory rules pertaining to banks must *ipso facto* apply to savings and loan associations.

In *Fahey* v. *Mallonee, supra,* the court also refers to corporate management as "a field in which courts have experience and many precedents have crystallized into well-known and generally accepted standards."

Would the petitioner use this language to draw the conclusion that all the rules applicable to business corporations must also apply to savings and loan associations?

In *Maher* v. *Reis, supra,* it is true that the court did make the statement quoted in petitioner's brief: "The subject institution is a federal savings and loan association. As such it has the character of a national Bank". But a reading of this statement in its context clearly demonstrates that the court meant that a state court should not normally interfere in the internal affairs of a corporation chartered under a federal act. In this respect, the court indicates, a federal savings and loan association, and, indeed any federally chartered corporation has "the character of a national bank". The key to the decision is found in this sentence: "*Irrespective of the national character of this institution,* the orderly procedure requires that there should be an exercise of the rights contained in the proxy before there is a judicial determination with respect to the same." (Italics ours.)

In *Marvin* v. *Kentucky Title etc.* (1927), 218 Ky. 135, 291 S. W. 17, 50 A. L. R. 1337, it is said:

> "It is well known that insurance companies and other like institutions, loan money yet they are not banks."

On the other hand, the case of *Eddy* v. *Home Savings and Loan Association* (1943 Dt. Ct. of App. 4th Dt. Cal.), 140 P. 2, 156, presents a state court decision squarely holding that the rules applicable to national banks do not govern federal savings and loan associations. The court said:

> "Plaintiffs argue that since the powers granted to national banks, generally, are held to exclude and withhold those powers not expressly granted, we should apply the same rule to building and loan associations organized under the Home Owners' Loan Act * * *. *Further, a building and loan association organized under the Home Owners' Loan Act is not a national bank and the powers and duties of the two materially differ.* In the entire absence of any authority on the question we will not extend the rule contended for by plaintiffs, to such associations." (Italics ours.)

In fact, cogent reasons appear why banks and savings and loan associations should not stand on the same footing. The differences are greater and more significant than the likenesses.

First, banks are usually owned by a relatively small number of stockholders; savings and loan associations are mutual associations, wherein each depositor is a member. We take it that the primary purpose of banks is to make money for their stockholders. Indeed, petitioner proudly announces that it pays dividends of 8% per annum to its stockholders (R. 16). Savings and loan associations, on the other hand, are organized "to provide local mutual thrift institutions in which people may invest their funds

and in order to provide for the financing of homes". 12 U. S. C. 1464a. The primary lending business of banks is in short term commercial paper, whereas the primary lending business of savings and loan associations is upon long term first mortgages on homes. The relation between banks and borrowers is strictly a debtor-creditor one. The relationship of a mortgagor to a savings and loan association is not only that of a debtor but also mutual-member-owner. The type of security held by a savings and loan association, being almost exclusively real estate, is substantially different from and less subject to rapid fluctuation and deterioration in value than much of the securities held by banks.

The beneficent public purposes to be served by the Home Owners' Loan Act and more specifically by the provisions of that Act relating to federal savings and loan associations are set forth in an annotation in 121 A. L. R. p. 117, Annotation I to provide emergency relief for distressed home owners and to promote a sound home mortgage system.

These primary purposes to be served by the creation of federal savings and loan associations highlight and emphasize their fundamental difference from commercial banks.

F. Use of "local" in statute does not negative Congressional intent to authorize branch offices.

Petitioner argues that the use of the word "local" in the statute implies a prohibition against branches. This seems a strained and illogical conclusion. Suppose, for example, the respondent association, whose home office is in Kearny, opened a branch office across the street, or a block away from its present home office. Would the business of the association be any less local because it had two offices instead of one? Or, to adopt the illustration in *Marvin* v.

Kentucky Title Trust Co. (1927), 218 Ky. 135, 291 S. W. 17, 50 A. L. R. 1337:

> "Suppose a bank occupies an entire city block and has offices at each corner of its building. Would the business in such case be any less local?"

We submit that what Congress meant by the term "local" as used in connection with federal savings and loan associations is found in section 5(c) of the act which provides that loans shall be made on property within 50 miles of the association's *home* office. This would be consonant with the well-recognized rule of statutory construction that where words of general import are followed by words of specific import, the words of general import are limited by later words of specific import. *Bell Telephone Co. of Pennsylvania* v. *Public Service Commission* (1935), 119 Pa. Super. 292, 181 A. 73.

But we need not base our objection to petitioner's narrow construction of the word "local" solely upon the provisions of the statute. There is abundant authority to buttress our argument.

The federal courts have given to the term "local" a far broader concept than that which plaintiff urges. In *Gillette* v. *Rockland Coaches* (1943), 50 F. Supp. 617, it was held that a transit company which conducted an interstate bus route plying between municipalities in Rockland County, New York, Bergen County, New Jersey, and New York City, was a *local* motor bus carrier and as such exempt from the wage and hour provisions of the Fair Labor Standards Act. It is significant that in the *Gillette* case, the court looked to other provisions of the Act to assist it in ascertaining the legislative intent in using the word "local", just as here we look to the 50-mile lending area provision as such an aid. Again, in the *Gillette* case, the court points out what we

have urged above that "The municipalities, towns, villages and localities served cannot be said to be contiguous. *But they are clearly within the suburban and business zone of New York City.*" (Italics ours.) The court then proceeds to cite data and statistics prepared by the Census Bureau to the effect that the New York-North Jersey Metropolitan District tends to be "a more or less integrated area with common economic, social, and, often, administrative interests". Cf. *Warnock* v. *Kraft* (1938), 85 P. 2d 505, 30 Cal. App. 2d 1; *U. S.* v. *Williams* (1944), 56 F. Supp. 514.

If petitioner's argument based upon the use of the terms "local" and "community" were carried to its logical conclusion, then not only would the defendant association be limited to one office in one municipality but it could not lend money on mortgages outside that municipality. If an association must show a necessity for its existence in "the community to be served" and if such community means the city, town, or village in which its office is located, that similarly delimits the scope of its service. Since the most essential service of a savings and loan association is the granting of mortgages, it could then only "serve" (that is, grant mortgages) within the political subdivision containing its office. Such a result would completely negative the express statutory 50-mile radius within which the association may grant loans. It thus appears that the full development of petitioner's argument, results in a *reductio ad absurdum.*

G. Use of "community" in the Act does not negative such intent.

Petitioner also argues that the statutory provision that a charter shall not be granted unless a necessity exists for such an institution in "the community to be served," precludes the establishment of branches. This seems a rather

strained construction. In the first place, the quoted phrase must be read in conjunction with the use of the term "home office", elsewhere in the statute. Secondly, once a charter has been granted, based upon necessity in the community, there is no implied prohibition against the establishment of branches. The mere requirement of showing of necessity for the "institution" does not preclude the institution having more than one office. Can it be denied that a bank having numerous branches in one city, is one banking institution?

Furthermore, the word community, as used in the statute, cannot be restricted to one political subdivision. It includes "region or place" as well as town, village or city.

Many courts have extended a broad definition to the term "community". We refer below to some of the cases:

"Community" means people who reside in a locality in more or less proximity. *State etc.* v. *Scott* (1924), 304 Mo. 664, 264, S. W. 369.

In *Busser* v. *Snyder* (1925), 282 Pa. 440, 128 A. 80, 37 A. L. R. 1515, the term "community" was held to embrace the entire commonwealth of Pennsylvania.

In *Gilman* v. *Dwight,* 79 Mass. 356, 74 Am. Dec. 634, where a physician transferred his practice and good will to another, the term "community" as used in a restrictive covenant was held to embrace the village in which the vendor practiced *and its vicinity.*

In *Lukens Steel Co.* v. *Perkins* (1939), 107 F. (2d) 627, 631, 70 App. D. C. 354, the court said:

> "The word *community* connotes a congeries of common interests arising from associations—social, business, religious, governmental, scholastic, recreational—involving considerations of public health, fire protection, water, sewage, transportation or other services, which bind together the people of

such a community or set them quarrelling with one another."

In *People* v. *Rote* (1924), 312 Ill. 99, 143 N. E. 492, in construing an act providing for school districts, the court said, "the term 'community' is intended to apply to school purposes, and not to other habits of persons living within a district."

By a parity of reasoning, the term community as used within the ambit of an act providing for savings and loan associations must be taken to apply to thrift and home-financing purposes, and not to other habits of persons living within the general area. Congress undoubtedly had such a consideration in mind when it fixed a radius of 50 miles from the home office as the lending territory of savings and loan associations, and thus, in effect, defined the terms "community" and "local" as used in the Act.

It cannot be doubted that all of metropolitan North Jersey is ecologically one area: virtually a suburb of New York City. And the information set forth in our counter-statement of the case clearly indicates that the boundary line between Kearny (which includes the section commonly known as Arlington) and North Arlington is an artificial political one. The very names of the two communities—Arlington and North Arlington—eloquently bespeak this fact.

H. The Home Owners' Loan Act sets forth sufficient standards to guide the Board in regulating branches and branch offices.

Where, as here, the statute does not prescribe in detail the manner of regulation, organization and operation, but merely prescribes broad standards for the administrative agency to follow in its formulation of rules and regula-

tions, then the grant of such power is to be liberally construed.

This rule and the reasons therefore are well stated in *American P. & L. Co.* v. *Sec. & Exchange Commission* (1946), 329 U. S. 90, and *Sunshine Anthracite Coal Co.* v. *Adkins* (1940), 310 U. S. 381, 388, from which we have quoted and which we have discussed above.

Here, in the light of the statutory command to study "the best practices of local mutual thrift and home-financing institutions in the United States"; in the light of the fact that many states had experience in liberal branch practices, it follows that, under the rationale of the *Fahey* v. *Mallonee, supra,* the regulations adopted constituted a proper exercise of administrative authority.

I. The McFadden Act has no relevancy to savings and loan associations.

The petitioner's discussion of the McFadden Act (see pp. 15-17 of petitioner's brief), while of great academic interest, has little bearing, we submit, on the controversy *sub judice.*

Indeed, one may well wonder why, if Congress was so careful to word the McFadden Act in 1932 to close any possible loopholes, and if Senator Wheeler carefully changed the word "permitted" to "authorized", the very next Congress, if it intended that savings and loan associations be subject to the same restrictions against branches, did not take equal care to write an express prohibition against branches in the Home Owners' Loan Act. As plaintiff was eager to point out, the latter Act was adopted only a year later than the McFadden Act. Indeed, the extreme dissimilarity between the careful prohibition against branches in the McFadden Act and the broad general powers conferred by the Home Owners' Loan Act suggests

very strongly that the Congressional intent was to vest broad discretion in the Board to investigate the relative merits of branch savings and loan offices, and to adopt branch regulations patterned upon the best practices in that field.

Furthermore, the lapse of a year between the 1932 McFadden Act and the 1933 Home Owners' Loan Act is far more significant than plaintiff indicates. This Court will recall that the Congress which went into office in 1933 was entirely different in philosophy and outlook from its predecessor. A strong executive had caused the introduction of a whole series of liberal "New Deal" legislation which marked a radical departure from the philosophy of the preceding regime. Although the chronological separation between the 1932 and 1933 Congresses was small, their ideological concepts were poles apart.

Nor can we agree that the 1932 Congress adopted a rule that federal *financial institutions* were restricted to a policy of state conformity as to branches. The most that can be said is that national banks—and national banks only—were so restricted by the McFadden Act. For any court to rule that the provisions of the National Banking Act, adopted long before federal savings and loan associations ever came into existence, were intended to apply to the latter type of institution, would amount to judicial legislation.

POINT III.

Even if there were no implied power to authorize establishment of a *branch*, there still would be power to authorize establishment of a *branch office*.

A. The cases distinguish between a *branch* and a *branch office*.

The case of *Bruner* v. *Citizens Bank* (1909), 134 Ky. 283, 120 S. W. 345, goes as far as any case we know, in holding that, where a state statute providing for the organization of banks is silent as to their right to establish branch banks, there is no implied authority to permit them to do so. The *Bruner* case is distinguishable from the instant case for many reasons; *inter alia*, there is a substantial difference between banks and savings and loan associations; the public policy of Kentucky favored strict construction of banking statutes against banks at the time of the *Bruner* case; and other distinctions could be developed. Yet the *Bruner* case applies only to *branches* and not to branch offices. For in the later case of *Marvin* v. *Kentucky Title Trust Company* (1927), decided in the same jurisdiction, 218 Ky. 135, 291 S. W. 17, 50 A. L. R. 1337, which cites the *Bruner* case with approval, a distinction is drawn between branch banks and branch bank offices, and it is there held that the latter do not constitute branch banks within the meaning of the interdiction of the *Bruner* case. The distinction is that the mere receipt of deposits and permitting of withdrawals does not constitute the business of banking, and that a branch office organized for this purpose does not fall within a rule forbidding the establishment of branch banks.

The discussion in the *Marvin* case, *supra*, points up the difference between a bank and a savings and loan associa-

tion, and demonstrates why rules applicable to the former are not necessarily appropriate to the latter. In a bank, main or branch, for example, there is usually at least one individual who can loan money on notes or other evidence of indebtedness, secured or unsecured, who can extend additional time, forbear suit, and exercise other discretionary functions. In a savings and loan association, on the other hand, the power to lend money is vested exclusively in the board of directors. They must meet at the home office. Reg. 202.9(b), By-laws Art. 4. They are solely vested with authority to determine when to foreclose mortgages, when to renew mortgage loans, when to extend loans and the like. Reg. 202.9(b), By-laws Art. 6. This power is exercised by the board of directors of defendant association, meeting at its home office. The branch office authorized is for the convenience of members in depositing and withdrawing money on income shares, paying installments on mortgage loans, submitting applications for loans and the like. Reg. 203.16(b). The convenience of the public will also be served, for even prior to the opening of the defendant's branch office, there were numerous mortgage loans held by the defendant on properties located near the present branch office, as well as many share accounts. Affidavit of S. Charles Melcher (R. 36).

We quote pertinent portions of the *Marvin* case:

> "Originally banking seems to have been restricted to the receiving of deposits. With the development of the business came the discounting of paper, the loaning of money, and the other varied activities in which modern banks engage, the enumerated powers which may be exercised by a bank under our statute; §579 being quite extensive. • • •
>
> "And in Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826, the court

is still more elaborate in its definition, saying: 'The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations.'

"* * * The paying teller of a bank should have a technical knowledge of handwriting and be able to detect forgeries and identify signatures, and both he and the receiving teller should be accurate in their calculations. But neither of these agents can loan money or invest the banking funds, and the fact that these minor duties are carried on at more than one place in no wise affects the bank's solvency."

Applying the criteria of the *Marvin* case, *supra,* to branch offices of savings and loan associations, we find the latter defined in Rules and Regulations for the Federal Savings and Loan System, 203.16(b) (1947 ed.), 24 C. F. R. 203.16:

"A branch office of a Federal association is a legally established place of business of the association authorized by the board of directors, at which subscriptions for share accounts and applications for loans may be received, and at which share account books and certificates of membership may be issued and loans, when properly approved by the board of directors, may be closed. Branch offices may receive share account and loan payments and shall keep detailed records of all transactions at such branch offices and shall furnish such control records to the home office as may be necessary for the proper con-

duct of the business. No Federal association may establish or maintain a branch office without the prior written approval of the board. Each application for such approval shall state the need therefor, the functions to be performed therein, the estimated annual expense thereof and shall be accompanied by a proposed annual budget of the association."

Note that subscriptions and applications for loans may be received, and the loans closed there, but no power is given to grant or approve loans at such branch offices, to grant extensions, etc.

Again payments may be received but records of all payments must be transmitted to and maintained at the home office.

This association was organized prior to the adoption of the new Rules and Regulations, and, therefore, it received the Charter K, which is set forth in the 1947 edition of the Rules and Regulations, Sec. 202.9(a).

It is true that the 1949 amendment to the Rules and Regulations (24 C. F. R. 145.14) does not expressly limit the business to be transacted at a branch office as fully as the above regulation 203.16. However, the respondent association is still limited in its operations by the provisions of Charter K, Regulation 202.9(a), for this is the Charter which was issued to it and is the organic document from which its rights and duties spring. It will be noted that Charter K provides that only the board of directors have power to extend leniency and indulgence to borrowing members who are in distress; to compromise and settle debts and claims, and to limit share payments which may be accepted. The board of directors must meet at the home office. Therefore, the provisions of Charter K restrict the more general grant of powers provided by the amendment to the regulation as embodied in 145.14,

and even that regulation prohibits the most important function of a savings and loan association, viz., the approval of loans, from being exercised at a branch office.

The acts permitted are essentially ministerial and administrative in nature, similar to those of a branch office as permitted and defined in the *Marvin* case, even in the face of a prohibition written into the Kentucky law against branch banks.

POINT IV.

There is no compelling reason for this Court to grant the writ of certiorari. Although the precise question raised by petitioner has never, to our knowledge, been passed upon by this Court, the principles applicable thereto are so clear and well settled that there is no necessity for this Court to accept jurisdiction and pass upon the meritorious question raised.

The case of *First Federal Savings and Loan Association* v. *Loomis*, 97 F. 2d 831, cert. dism. 305 U. S. 666, has sustained the constitutionality of the act. As we have pointed out above, *Fahey* v. *Mallonee*, 332 U. S. has reaffirmed not only the constitutionality of the act, but also the right of Congress to delegate broad legislative and rule-making authority to the Federal Home Loan Bank Board.

For many years, as we have shown above, this Court has approved statutes such as this which lay down merely the broad policy and delegate to a board of experts the responsibility for implementing and carrying out the means of achieving the statutory policy. *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381.

Insofar as the petitioner contends that the decision of the Court of Appeals in the instant case is in conflict with *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640 and *Fahey* v. *Mallone*, 332 U. S. 245, we believe we have demonstrated that the *First National Bank* case is not in point, and that the case of *Fahey* v. *Mallonee* is in accord with the decision of the Court of Appeals in the instant case sustaining the administrative regulation here attacked.

There are no conflicting decisions in the Circuit courts and if certiorari be denied in this case, the opinion of the Court of Appeals below on the meritorious question of the validity of branch office regulations adopted by the Home Loan Bank Board, which, we submit, is correct, will stand as the law of the land.

POINT V.

Reservation of other defenses.

In the event that this court grants the writ of certiorari applied for, respondent reserves the right and intends to argue, in addition to the points briefed herein, the following:

1. This Court should not grant the relief sought because:

   a. The exclusive jurisdiction is in an administrative agency.

   b. Administrative remedies have not been exhausted.

2. This Court cannot grant the relief sought because of petitioner's failure to join indispensable parties defendant.

   a. The members of the Federal Home Loan Bank Board are indispensable parties.

b. The Attorney General of New Jersey is an indispensable party.

3. The petitioner is in laches.

4. Petitioner's complaint presents no justiciable controversy.

Conclusion.

For the foregoing reasons, we urge that the petition for writ of certiorari be denied.

Respectfully submitted,

FRANK G. MASINI,
Counsel for Respondent.

FILED
JUN 5 1951

IN THE

Supreme Court of the United States

OCTOBER TERM 1950.

No. [redacted] 66

THE NORTH ARLINGTON NATIONAL BANK,
Petitioner,

vs.

KEARNY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

BRIEF *AMICI CURIAE* ON BEHALF OF NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

FRED N. OLIVER
WILLARD P. SCOTT
MICHAEL F. MCCARTHY

Dated: June 4, 1951

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 748

THE NORTH ARLINGTON NATIONAL BANK,
Petitioner,

vs.

KEARNY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

BRIEF *AMICI CURIAE* ON BEHALF OF NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Statement.

The undersigned members of the bar of this Court, file this brief as *amici curiae,* pursuant to Rule 27(9)(b), on behalf of the National Association of Mutual Savings Banks, in support of the petition for a writ of certiorari. There have been filed with the Clerk of this Court the written consents of all parties who have entered appearances here in this case.

The question presented in this case is whether or not the Home Owners' Loan Act of 1933 (48 Stat. 128, 12 U. S. C. sec. 1461 ff.) gives the Federal Home Loan Bank Board power to authorize federal savings and loan associations to establish branches. The court below held

that the Home Owners' Loan Act of 1933 granted such power. The question thus arising of the interpretation of a federal statute is one of general public importance, raising an issue that should be decided, we submit, by this Court.

The National Association of Mutual Savings Banks is an unincorporated association with its principal office in New York City, whose members consist of 529 mutual savings banks located in the 17 states where mutual savings banks exist. These banks operate under state charter and state supervision. They have deposits approximating $20,000,000,000 belonging to 20,000,000 depositors. They are non-stock, non-profit institutions, managed by boards of trustees. Their purpose of promoting thrift among persons of limited means is effectuated by receiving savings and investing them, principally in real estate mortgages and government bonds.

The public is vitally interested that no competitive practice develop which may adversely affect the stability of financial institutions of such size and importance. Over a long period of time it has been recognized that financial institutions, such as banks and insurance companies, are so affected with a public interest that certain injurious competitive practices must be prohibited in the protection of the public. Needed protection is in accord with general public policy. Such well established public policy, it is submitted, should be weighed in the consideration of the intent and meaning of the Home Owners' Loan Act of 1933 as respects the establishment of branches.

For a statement of the facts of this case and the statutory jurisdiction of this Court, we respectfully refer the Court to the petition.

ARGUMENT.

I. The Question of Federal Law Presented is of Great Public Importance.

Mutual savings banks compete with federal savings and loan associations in seeking to attract the savings of wage earners and others of generally limited means. In attempting to increase the number of their depositors, relative to the size of the community that they serve, mutual savings banks not only promote and encourage thrift, but also tend to increase the stability of their operations. In so doing, they necessarily face the competition of other thrift institutions, both state and national.

Healthy competitive conditions among thrift institutions, as in other fields of endeavor, present a challenge which mutual savings banks are prepared to meet. To this they have no objection. However, the necessity for avoidance of unsound competitive practices in our national and state banking systems has been long recognized.

For example, prior to 1927, national banks were not permitted to establish branches. In that year the statute was amended to permit branches, but on a basis limited to the privileges enjoyed by competing state institutions in the state of domicile (44 Stat. 1228; 12 U. S. C. sec. 36).

At the present time state laws sharply restrict the privilege of establishing mutual savings bank branches. Limitations are also imposed upon the establishment of branches by competing state thrift institutions, such as state chartered savings and loan associations. Thus a reasonable balance is preserved in competitive conditions among state thrift institutions.

The Home Loan Bank Board has assumed the power to authorize the establishment of branches by federal savings and loan associations not only without express authoriza-

tion from Congress but also without regard to the standards set up by state regulatory authorities for competing institutions. For instance, in this proceeding the Home Loan Bank Board has authorized the establishment of a branch in New Jersey notwithstanding the fact that under New Jersey state law no state chartered savings and loan association may acquire the right to establish a branch except in the case of merger or consolidation (New Jersey Laws of 1946, ch. 56, §21, N. J. S. A. 17:12A §21). Likewise, in Massachusetts it has authorized Worcester and Pittsfield savings and loan associations simultaneously to open branches in Springfield, approximately 40 miles away, despite a Massachusetts statute expressly forbidding such branch privileges (Mass. Gen. L., Ch. 167, sec. 37A; Ch. 170, sec. 11).

The action of the Home Loan Bank Board, without statutory authority, in permitting establishment of branches by federal savings and loan associations in a manner inconsistent with state laws applicable to other savings institutions thus endangers the sound balance heretofore maintained in the banking system. Continuance of this policy gives rise to unsound competitive conditions in a manner not only contrary to state regulation in the several states but likewise contrary to the policy adopted by Congress for application to banking institutions.

The questions thus raised obviously create far-reaching disturbances in the sensitive interrelations of state and federal regulation of the nation's banking system.

In thus flying in the face of the public interest, as evidenced by the action of Congress and of the several states, the Home Loan Bank Board has done so without any specific grant of power from Congress and, as we later show, without even any implied grant of power.

No such threatened impairment of the banking structure, through introduction of unsound competitive conditions should be permitted, we submit, without the most careful consideration of the ensuing consequences. To the extent that such consideration has been given by Congress, it has apparently been resolved in the negative, since the Home Owners' Loan Act of 1933 fails to contain such a grant of power. Such an assumption of power by an administrative agency, in a field of such vital and delicate relations, invites the most searching inquiry. The consequences are far reaching and of substantial national importance.

Consequently we submit that the issue thus raised should be reviewed by this Court.

II. The Issue Presented Has Been Decided by the Court Below in a Manner Probably in Conflict With an Applicable Decision of This Court.

The question as to whether national banks could establish branches under the National Bank Act of 1863 came before this Court in *First National Bank of St. Louis* v. *Missouri*, 263 U. S. 640 (1924). It was contended that the establishment of a branch is the exercise of an incidental power conferred by the statutory provision granting "all such incidental power as shall be necessary to carry on the business of banking" (Rev. Stat. sec. 5136). This Court held, however, that the power did not exist, saying (at p. 658):

> "The mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business, within the meaning of this provision."

That this decision was a considered factor in the legislative policy of Congress is evident from action twice taken

thereafter but before enactment of the Home Owners' Loan Act of 1933. In 1927 Congress passed the McFadden Act, which for the first time gave national banks power to establish branches but subject to the limits imposed by state law for state banks (44 Stat. 1228, 12 U. S. C. sec. 36). Again in 1932 an attempt in Congress to depart from the principle of equality with state privileges resulted in the imposition of even further limitations on the establishment of branches (Section 23 of The Banking Act of 1933, 48 Stat. 189, amending Rev. Stat. sec. 5155, 12 U. S. C. sec. 36).

It is thus evident that when, a year later, Congress enacted the Home Owners' Loan Act of 1933, it was thoroughly familiar with the principles enunciated by this Court in the *Missouri* case, holding that branch banking powers are not implied powers.

Under these circumstances, the failure of Congress to authorize branches for federal savings and loan associations is, we submit, strong evidence of the intent of Congress to deny such powers.

The Home Loan Bank Board has always assumed the power to authorize the establishment of branches by federal savings and loan associations. However, commencing about 1948 it embarked upon a new policy of widespread authorization of branch facilities for federal savings and loan associations in disregard of state laws, thus providing an unforeseen and disruptive factor in the operation of thrift and banking institutions.

This departure from the principles established by this Court in the *Missouri* case, and from the intent of Congress, as evidenced by the circumstances surrounding the adoption of the Home Owners' Loan Act of 1933, call, we submit, for a review by this Court in order that this important issue may be finally determined.

Conclusion.

For the reasons set forth above, we request that this Court issue its writ of certiorari directed to the Court of Appeals for the Third Circuit, for the purpose of reviewing the record and the issues in this cause.

Respectfully submitted,

FRED N. OLIVER,
WILLARD P. SCOTT,
MICHAEL F. MCCARTHY.

Dated: June 4, 1951.

[APPENDIX FOLLOWS]

APPENDIX.

Home Owners' Loan Act of 1933 as amended, Section 5(a), (b), (c), (e). 48 Stat. 132, 12 U. S. C. sec. 1464, (a), (b), (c), (e).

(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness, shall be issued except for such borrowed money as may be authorized by regulations of the Board.

(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: *Provided,* That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further,* That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank: *And provided further,* That any such association

which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter.

Notwithstanding any other provision of this subsection except the area restriction such associations may invest their funds in loans insured under sections 1702, 1703, 1705, 1706, and 1706b of this title, loans guaranteed or insured as provided in sections 693-697g of Title 38 (except business loans provided by section 694c of Title 38 and not secured by a lien on real estate), or in other loans for property alteration, repair, or improvement: *Provided,* That no such loan shall be made in excess of $1,500 except in conformity to the other provisions of this subsection, and that the total amount of loans so made without regard to the other provisions of this subsection shall not, at any time, exceed 15 per centum of the association's assets.

• • • • • •

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

• • • • • •

National Banking Act, as amended, Section 7. 48 Stat. 189, 190, 12 U. S. C. sec. 36.

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immedi-

ately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) If a State bank is after February 25, 1927, converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank on February 25, 1927.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Pro-*

vided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000; *Provided*, That in States with a population of less than one million, and which have no cities located therein with a population exceeding one hundred thousand, the capital shall be not less than $250,000: *Provided*, That in States with a population of less than one-half million, and which have no cities located therein with a population exceeding fifty thousand, the capital shall not be less than $100,000.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601-605 of this title, authorizing the establishment by national banking associations

of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank", "State banks", "bank", or "banks", as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

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No. [redacted] 66

THE NORTH ARLINGTON NATIONAL BANK,
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KEARNY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondents.

BRIEF OF NEW JERSEY BANKERS' ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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